U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 16 December 2002

CASE NO.: 2002-LHC-518

OWCP NO.: 7-136426

IN THE MATTER OF

CARLOS ARBOLEDA
Claimant

v.

L'HOMME, INC
Employer

and

LOUISIANA WORKERS COMPENSATION CORPORATION
Carrier

APPEARANCES:

James Shields, Jr., Esq.
For Claimant

David Johnson, Esq.
Ted Williams, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Carlos Arboleda

(Claimant) against L'Homme, Inc. (Employer) and Louisiana Workers Compensation Corporation (Carrier). The formal hearing was conducted at Metairie, Louisiana on July 25, 2002. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-51 and Employer's Exhibits 1-13. This decision is based on the entire record.[2]

Stipulations[3]

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on April 27, 1995;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on April 27, 1995;
5. A Notice of Controversion was filed June 8, 2000;
6. An informal conference was held by telephone on April 16, 2001;
7. The average weekly wage at the time of injury is in dispute;
8. Temporary total disability and temporary partial disability is disputed from January 19, 2000 to July 9, 2001; (Employer paid Claimant benefits including temporary total disability from April 27, 1995 to January 18, 2000 and again from July 10, 2001 to present and continuing at $190.23 per week);
9. Medical benefits have been paid, totaling $64,471.02; and
10. Claimant has not reached maximum medical improvement.

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through November 25, 2002.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

[3]JX 1

Issues

The unresolved issues in this proceeding are:

1. Nature and Extent of Claimant's entitlement to temporary total disability benefits from January 19, 2000 to July 9, 2001;
2. Average Weekly Wage;
3. Outstanding medical bills including; prescriptions and treatment as described in CX 42, 47, 27; and
4. Attorney's Fees, Penalties, and Interest.

Statement of the Evidence

Testimonial and Non-Medical Evidence

Carol Arboleda, a welder by profession, was 47 years old at the time of the hearing. Claimant is originally from Columbia, South America, having immigrated to the United States in 1973. Shortly after arriving in America, Claimant learned to weld at Avondale Shipyard, and eventually became a first-class welder. In 1981, while working at Todd Shipyard, he lost a finger on his right hand, due to a work place accident. Claimant taught himself to weld with his left hand, and has been welding for over 25 years. Claimant is primarily Spanish speaking, with some limited use of the English language.

Claimant testified at the formal hearing that on April 27, 1995, he was assigned to weld on a lower deck of a barge. Claimant was instructed by a supervisor to tie the ladder used to descend to his work spot with a rope that had a bucket attached to the end. At lunch time, while ascending the ladder, he looked up and saw an individual waiting at the top of the ladder. Claimant testified that he expected the man was waiting to help him by receiving his work tools. In fact, the co-worker had untied the rope which held the ladder, and Claimant fell more than 22 feet to the deck of the barge. As a result of the accident, Claimant testified that he has had multiple injuries and surgeries. Specifically, Claimant testified that he injured his face, knee, shoulder, hip, and hand. He continues to have problems with his shoulder and his hips, and has requested surgery for his left hand. Claimant agreed that he has not worked, or looked for work, since the accident.

Based on a review of the entire record, it is apparent that Claimant has seen these doctors from the date of his accident to present. He had several surgeries, including arthroscopic knee surgery performed by Dr. Warren Bourgeois on November 13, 1998, as well as gum surgery performed by Dr. Charles McCabe in January and April 1997, and oral TMJ bilateral surgery performed by Dr. Demarcus Smith on November 7, 1997.

Due to his multiple injuries, Claimant has seen approximately twenty doctors over the seven years since his accident. Drs. Warren Bourgeois and Thomas Lyons saw Claimant for general evaluation and treatment of his orthopedic injuries, namely his knee and shoulder. He saw Drs. Frank Schiavi, Donald Faust, Daniel Gallagher, Harold Stokes, Richard Meyer and Scott Greenberg specifically for treatment and evaluation of his hand and thumb injuries. Claimant was treated and evaluated for his face and jaw injuries by Drs. P.J. Walters, Anthony Indovina, Demarcus Smith, Dennis Booth, Raul Ramirez, and Charles McCabe. Claimant also went to Drs. Charles Murphy and Mark Juneau, as well as Drs. Rajemdra Jain and Anthony Macaluso for independent examination and related tests. Claimant saw Dr. Edwin Ross for an audiology examination, and Dr. Carlos Gorbitz for a neurological evaluation. Claimant was also referred for several sessions of physical therapy and work hardening, as well as functional capacity evaluation, at Rehability Center, Crescent City Physical Therapy, The Health Center, and Orthopaedic Physical Therapy of New Orleans. Primarily the costs of Drs. Lyons, Ramirez, Stokes, Greenberg, and Ross are at issue in this case. Carrier has already authorized and paid for the costs of treatment associated with Drs. Bourgeois, Faust, Gallagher, Schiavi, Walters, Indovina, McCabe, Booth, Gorbitz, Juneau and Murphy.

Claimant was treated primarily by Dr. Bourgeois from October 30, 1995 until July 21, 1999 when he was released to sedentary work with the understanding that he needed further surgery and treatment. From August 16, 1999 until July 5, 2001, Claimant was treated by Dr. Lyons. Then Claimant resumed seeing Dr. Bourgeois on May 5, 2001, as he wished to have shoulder surgery. Since that time Claimant has been seeing Dr. Bourgeois.

Claimant initially saw Dr. Walters, and his colleague Dr. Smith for the injuries sustained to his jaw, beginning in May 1995. Dr. Smith became Claimant's primary dentist and oral surgeon by November 1997. Dr. Booth was Claimant's orthodontist from June 4, 1996 until approximately June of 1998. It is unclear from

the record why Dr. Booth did not continue to see Claimant, however in May 1998, Dr. Smith recommended that Claimant consult an orthodontist.

Judith Lide, who testified at the formal hearing, is a vocational rehabilitation counselor employed by American Rehabilitation Consultant Services. The reports are Claimant's Exhibit 6. Her first report is dated May 22, 2001, followed by a report dated July 18, 2002. She did not meet with Claimant, for the second report, but relied instead on Mr. Jeffrey Carlise's, a vocational rehabilitation expert, records (EX 6). Ms. Lide is a certified rehabilitation specialist by the U.S. Department of Labor, and testified at the formal hearing in the capacity of a vocational rehabilitation expert.

Ms. Lide testified that she evaluated Claimant to ascertain his employability. She found that he had very limited use of the English language, however, his ability to comprehend English exceeded his ability to speak. He scored at the fourth grade level in the reading tests, however, spelling was only on a first grade level, with arithmetic at the third grade level. On the vocational interest survey administered orally by Ms. Lide, Claimant was found to have a higher interest in work he had done previously as a store clerk or restaurant worker than in welding. Ms. Lide said that she did note in her report that Claimant could read scale drawings and blueprints, as well as use shop math and calculate dimensions consistent with his welding ability.

Ms. Lide also expressed some of the problems she perceived in finding employment for Claimant, namely, that he was not only limited physically due to his injury, including a missing digit from a previous injury, but also had difficulties reading and writing English. Ms. Lide had not reviewed Claimant's deposition from December 7, 1998, which was given without an interpreter (EX 11), and she agreed that Claimant can understand a great deal more than is apparent(TR 64). However, she encouraged a more pragmatic approach to finding employment in order to deal with Claimant's capabilities with each hand and how he communicates in English. Ms. Lide also noted that due to Claimant's hand problems he is only capable of writing, letters or numbers, very slowly.

In reviewing Claimant's medical records, Ms. Lide found that he continued to be treated for his hip and shoulder, as well as his face, both knees, and his left hand. In taking it all into consideration, Ms. Lide opined that she would only consider

placing Claimant in an employment situation after he had a medical release from doctors that included restrictions. In addressing the time period from January 1, 2000 until July 2001, Ms. Lide felt that Claimant was impaired. However, she conceded that she had not seen any documentation of a doctor's release or identified suitable alterative employment, specifically saying that she had not seen either Dr. Smith's or Dr. Lyon's reports (TR 61). Ms. Lide testified that she would not choose jobs for Claimant's abilities until he had reached maximum medical improvement and was assigned impairments ratings and appropriate restrictions. Therefore, she did not identify any suitable jobs, however, she felt that when Claimant was released, she would consider jobs that come available from time to time in the New Orleans area, such as laundry sorter, folder, and auto deliverer, as well as service attendant, all of which would be light to light-medium positions (TR 59).

Ms. Lide testified about Claimant's ability to earn wages. Ms Lide agreed that as a welder Claimant was able to cross all the cultural and language barriers, and had welded successfully for 25 years. She noted that the median hourly wage for welders throughout the entire United Sates was $12.00/hour in 1995, however she did not make an effort to determine the hourly wage for welder in South Louisiana in 1995. Ms. Lide reviewed the pay stubs from several weeks of Claimant's employment at Lombas Contractor's Inc., where he earned between $240 and $434 per week, which she said was typical for welders in 1995.

Ms. Lide reviewed a vocational rehabilitation evaluation performed by Jeffrey Carlise from Jennifer Palmer & Associates (EX 6) dated December 22, 1999. One of the jobs chosen was an airport checker, whose job duties included escorting people to the correct shuttle, and directing passengers to the right terminal or baggage claim. Ms. Lide explained that this job would be sedentary as far as lifting was concerned, and would primarily consists of standing and walking. She explained that the employee would also have to be proficient enough with the English language to communicate with passengers, as well as complete written reports with each shuttle-load of passengers. Ms. Lide understood that Dr. Bourgeois had approved the job, with a restriction on handling baggage. Ms. Lide felt that the biggest obstacle for Claimant in this particular job would be English proficiency in addition to the report making requirement, and she commented that she would not have selected this particular job for Claimant.

The second job that Ms. Lide reviewed was a towing dispatcher with Rock and Roll Towing. This job was sedentary, in that it did not require lifting more than 10 lbs. However, Claimant would have to be able to handle the two-way radio to give and receive instructions to tow truck drivers and stranded motorists. Ms. Lide was concerned that Claimant was not familiar enough with the city to be an effective dispatcher. She felt too that his speaking disability, or language deficiency, would make this job an unsuitable one.

The third job that had been identified for Mr. Arboleda by Mr. Carlise was a punch line operator. However, Claimant's treating physician, Dr. Warren Bourgeois, did not approve this job as within Claimant's medical restrictions. Therefore, Ms. Lide did not address its' suitability.

The fourth job that had been identified for Mr. Arboleda by Mr. Carlise was an automated line worker. However, the company with whom this job had been listed had moved, and Ms. Lide was unable to further evaluated this employer. The job had been described as repackaging Tylenol pills for redistribution by physicians. Ms. Lide was uncertain whether Claimant's hand disabilities would have made this job too difficult for him to perform between January 2000 and July 2001.

In sum, Ms. Lide agreed that taking all his disabilities into consideration including: his speech problems, both as a result of the surgical intervention as well as lack of English proficiency, the physical limitations of his legs and shoulder, and the missing digit of his hand, she would not find him employable from January 2000 through July 2001. However, Ms. Lide further testified that she would follow the instructions of Claimant's treating physician, if he approved it medically, then she would assume that he was physically capable of performing the job.

Jeffrey E. Carlise, a vocational rehabilitation expert, testified at the formal hearing. His records are Employer's Exhibit 6.[4] He had been employed by Jennifer Palmer & Associates for eleven years at the time of the hearing. Mr. Carlise first began working on Mr. Arboleda's case in August 1999, in order to perform a rehabilitation assessment and render a report with recommendations for services and job placement. Mr. Carlise reviewed the medical records from Dr. Bourgeois,

[4] The records include a letter dated September 2, 1999, as well as three copies of the labor market survey dated December 22, 1999.

Physical Therapy of New Orleans, Dr. Smith, Dr. Gallagher, Dr. Faust, American Rehabilitation Consultant Services, Dr. Juneau, Health Center at West Jefferson Medical Center, Dr. Gorbitz, physical therapist Billy Naquin, and Dr. Frank Schiavi. After reviewing the records, Mr. Carlise determined that Dr. Bourgeois had indicated that Claimant was physically able to perform sedentary employment on July 22, 1999. Mr. Carlise also determined that Dr. Gallagher and Dr. Faust, both orthopedic specialists who had evaluated Claimant, found no orthopedic abnormalities that would restrict Claimant from working. In determining Claimant's abilities, Mr. Carlise specifically reviewed the records of Margo Hoffman at the American Rehabilitation Consultant Services.

Claimant missed both of the interview appointments that Mr. Carlise had scheduled, so he relied heavily on past vocational rehabilitation assessments to fill in the missing information that he anticipated gathering from Claimant himself.[5] Mr. Carlise agreed that it would be important to meet with the individual before performing vocational rehabilitation services for him; however, due to Claimant's failure to appear, he proceeded with the information that was available. Mr. Carlise remarked that Ms. Hoffman had recommended Claimant enroll in an English-as-a-Second-Language program as early as May of 1997, however, he only later discovered that Claimant had never followed through on the recommendation.

Mr. Carlise testified at the formal hearing about the report the he had prepared regarding suitable alternative employment dated December 22, 1999(EX 13, EX 6, p.7). He explained the goal of vocational services for Claimant, as transferring as many of the skills Claimant had acquired while welding, and adding those which might lead to more lucrative employment. He had the benefit of having heard Ms. Lide testify regarding the report he had prepared, and was therefore able to address her concerns and criticisms.

Mr. Carlise explained in further detail the job of an airport checker, in an effort to clarify some of Ms. Lide's misconceptions and concerns. He commented that it was actually a position in which the employee could sit in the office until

[5] Mr. Carlise testified that he sent an appointment notice to Claimant's attorney more than three weeks in advance, notifying him of an appointment; however, on September 27, 1999 Claimant failed to appear. Then again on October 21 1999, he sent a certified letter in sufficient time requesting that Claimant come to an appointment; however, was again unsuccessful (EX 12). Mr. Carlise then prepared his report without having personally interviewed Claimant.

airport passengers had departed baggage claim and needed transportation. At that point, the airport checker would leave the office and help the passengers find an available shuttle. Based on his review of Dr. Bourgeois' opinions, as well as the functional capacity evaluation (CX 22), Mr. Carlise testified that he felt that Claimant would be capable of performing the duties of an airport checker.

Mr. Carlise then addressed the concerns about Claimant's ability to read and write English sufficiently to be able to perform the duties of a towing dispatcher. Mr. Carlise explained that he felt that the sedentary position was physically appropriate, and that the basic reading and writing skills were not a problem; however, he had been unaware that Claimant was missing a digit on his right hand. Mr. Carlise said that based on Claimant's testimony during the formal hearing, he felt that he had sufficient language skills to successfully perform the jobs that had been chosen for him.[6]

As to the availability of the positions mentioned in his original report, Mr. Carlise had followed up with the employers in early 2000 and spoke with the employer or otherwise confirmed each position that had been offered. He specifically testified that the automated line worker position was not only in business, but taking applications in early 2000. In a letter sent certified mail and in care of Claimant's attorney, dated December 22, 1999, Mr. Carlise informed Claimant of the positions and offered to provide job placement services if Claimant was interested; however, he did not include Dr. Bourgeois approval of the jobs(EX 13). When Mr. Carlise did not hear back from either Claimant or his attorney he closed his file on January 14, 2000.

Mr. Carlise agreed that he would like to re-evaluate the jobs, based on the information he had gathered at the formal hearing, so he was therefore incapable of saying for a fact that the airport checker job was a valid job for Claimant. As to the automated line worker, however, Claimant would not have to handle the items with any sort of dexterity, and he could sit and stand throughout his shift. Since the job required only gross motor skills for pushing buttons, Mr. Carlise maintained that Claimant was capable of performing the duties required.

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[6] Mr. Carlise testified that he had assumed that Claimant had followed up on recommended ESL classes when he chose jobs that would be suited to his skills. However, Mr. Carlise explained that even determining, at the time of the formal hearing, that Claimant had not made an effort to pursue ESL classes, he still felt that he would not dismiss the possibility of those jobs. (TR 116)

Ms. Brigette Fletcher, a senior claims representative for Louisiana Worker's Compensation Corporation (LWCC), testified at the formal hearing (TR 154). She testified that Dr. Warren Bourgeois, an orthopedic surgeon, was Claimant choice of physicians, and had been treating Claimant since 1995. She further explained that Dr. Faust was referred by Dr. Bourgeois to treat Claimant for his left hand and thumb. As far as Ms. Fletcher was concerned, Dr. Bourgeois had not referred Claimant to any other physicians for treatment of his hand or thumb. Ms. Fletcher also testified that LWCC asked Claimant to see Dr. Juneau and Dr. Murphy, both orthopedic surgeons, however, Claimant had not been authorized to see Drs. Lyons, Stokes, or Ross.

Ms. Fletcher testified that any denial of a request for a different physician would be based on the fact that Claimant had already chosen an orthopedic doctor. Ms. Fletcher also noted, in her experience, if there was an issue of noncompliance with the treating orthopedic physician who refused to treat Claimant, but did not release Claimant from medical care, Claimant would not be entitled to another treating orthopedist.[7] Ms Fletcher testified that Claimant was in fact denied authorized treatment with Dr Lyons.

Ms. Fletcher also testified that when Claimant filed a claim he was presented with a pharmacy card, which would allow him to charge those medications that had been prescribed by a authorized physician, as oppose to having to pay cash. Ms. Fletcher testified that there was no indication in the adjuster's file that LWCC was aware that Claimant was paying cash for prescriptions. She further remarked that the pharmacy typically calls for authorization, and if the prescription is from an unauthorized physician, then it is denied. However, she opined that the prescription card, and the corresponding account with LWCC that Claimant had originally been issued, was still valid as of the time of the formal hearing.

Employer's Exhibit 4 is the report of Kenneth Boudreaux, Ph.D. Dr. Boudreaux was hired by the defendants in Claimant's third party tort suit to assess

[7] There was an objection to characterizing Claimant's discharge from Dr. Bourgeois' care as refusal to treat him. However, Ms. Fletcher agreed that she understood that because of Mr. Arboleda's noncompliance, Dr. Bourgeois was not going to treat him. She further explained that typically she works with doctors to have them re-treat the non-compliant patient.

Claimant's wage earning capacity over the remainder of his lifetime.[8] The report is dated April 10, 2000. He opined that because of the large differences in abilities to earn income among even demographically similar individuals, the best evidence of Claimant's ability to earn wages is his past history of income to that point. Dr. Boudreaux calculated the average of Claimant's income from 1992 through 1995 to be $9,740.18. He felt that an average was appropriate because of Claimant's income variability. He further explained that accounting for the passage of time and economic influences upon income, Claimant's annual wage earning capacity was $11,276.70 (EX 4, p.3).

Employer's Exhibit 5 is the report of Melville Wolfson, Ph.D. Dr. Wolfson was retained by Claimant, for the purposes of his third party tort suit, to estimate the diminution of earning capacity and associated economic impairment. Dr. Wolfson's results were that Claimant had a base annual earning of between $11,692.00 and $14,225.00. Dr. Wolfson's calculations were based on the information supplied by Claimant's attorney, namely that Claimant had made $12,128.00 in 1993 and $11,256.00 in 1994. Because the accident occurred in 1995, the base from April 10, 2000 increases the 1993-1994 average by 4% each year, to $14,224.00 by 2000. Dr. Wolfson also included the calculation of Claimant's earning if he worked 40 hours per week at $12 per hour, resulting in an earning potential of $24,960.00 annually (EX 5, p. 4).

Employer's Exhibit 9 is Claimant's tax returns from 1991 through 1993. In 1991 Claimant reported $7,404.00, in 1992 Claimant reported $8,999.00, and in 1993, Claimant reported earnings of $12,129.00.

Medical Evidence

Dr. Warren Bourgeois, an orthopedic physician and Claimant's choice of treating physician, saw Claimant from October 30, 1995 to July 21, 1999, and then again from May 22, 2001, to the present. The intervening months from July 1999

[8]Claimant's suit was tried in federal district court Eastern District of Louisiana on April 10, 2000, *Carlos Arboleda v. Elmwood Drydock & Repair, Inc., et al.*

through May 2001, Claimant saw Dr. Thomas Lyons, another orthopedic surgeon. Dr. Bourgeois' records are Claimant's Exhibits 9 & 15.[9]

Dr. Bourgeois' report from January 15, 2000, was a detailed description of Claimant's condition from the initial visit, at Claimant's attorney's request in October 1995 until Claimant was discharged from Dr. Bourgeois' care in July 1999, for noncompliant behavior. Initially, Dr. Bourgeois had diagnosed Claimant with a left acromioclavicular joint sprain with chronic grade 1-2 separation, a mild lumbar sprain, a strain with a possible torn meniscus left knee and a ligamentous injury to the metacarpal phalangeal joint of the left thumb. He was conservatively treated, but subsequently complained of pain in the thoracolumbar region and anterior inferior costachrondral region on the left side of his sternum. Dr. Bourgeois felt that arthroscopic surgery for subacromial decompression and resection of the acromioclavicular joint was recommended, however, this was not performed until 2001.

On March 12, 1996, Claimant attended a work hardening evaluation at The Health Center at West Jefferson Medical Center, as recommended by Dr. Bourgeois. Anne Guidry, O.T., performed the evaluation, which was to serve as a base line for further therapy. In her report, which is part of Claimant's Exhibit 20, she felt that Claimant was both unwilling to maintain proper body mechanics, as well as exhibiting self-limiting behavior. She continued to explain that Claimant had walked slowly and fluidly upon arriving at the clinic, however, he exhibited poor body mechanics during lifting. Ms. Guidry also noted that Claimant muscoskeletal testing was inconsistent with physical performance. In sum, Ms. Guidry felt that she was unable to determine maximal physical functional capacities secondary to self limiting behavior. In an undated letter, Ms. Guidry explained to Dr. Bourgeois that Claimant was discharged from the program because he had missed four scheduled sessions without a valid excuse. She encouraged Dr. Bourgeois to discuss Claimant's attitude and attendance with him, convinced that it would make a difference.

Dr. Faust, a hand and orthopedic surgeon referred by Dr. Bourgeois, saw Claimant on August 2, 1996 (CX 3). After examining Claimant, Dr. Faust opined

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[9] Although CX 15 was labeled as Dr. Faust's records, I found it contained some of Dr. Bourgeois' handwritten notes.

that Claimant had complaints of pain in the upper left extremity without any evidence of atrophy, swelling, deformity, or loss of motion. Dr. Faust noted that Claimant was also tender over the thumb metacarpophalangeal joint and radial collateral ligament, but the structure appeared to be functionally normal. He recommended that Claimant take aspirin for the discomfort and remain active. He did not think Claimant was a candidate for surgery. A copy of his letter was sent to Dr. Bourgeois. Dr. Faust saw Claimant again on May 22, 1998. However, the only evidence of Dr. Faust's findings, is a partial report that was part of Claimant's Exhibit 3, and there is no way of determining the conclusions from this exhibit.

Throughout 1997, Claimant continued to see Dr. Bourgeois for treatment (CX 4). On January 6, 1997, Claimant had a x-ray of his shoulder and finger as well as a arthrocentesis, followed by an office visit on February 3, 1997. Claimant saw Dr. Bourgeois monthly, for check ups and prescriptions.[10] Claimant also underwent an MRI at Memorial Medical Center at the referral of Dr. Bourgeois on May 12, 1997. During this same time period, Claimant was receiving treatment and surgery for is jaw injuries.

On November 13, 1998, arthroscopic surgery was performed on Claimant's left knee, with a torn meniscus being observed and partial medial meniscectomy performed. After the surgery, Claimant recovered well, however, he was still experiencing pain from the chest and back injuries that were consistent with a fall from 22 feet. Dr. Bourgeois felt that the costochrondral separation along the left lower border of the sternum might be a source of chronic pain and was probably permanent, and there was no treatment for this injury except for anti-inflammatory and pain medication. As to Claimant's chronic swelling and pain along the ulnar aspect of the metacarpal phalangeal joint of the left thumb, Dr. Bourgeois had referred Claimant to a hand specialist, Dr. Faust, for further evaluation and recommendation (CX 15, p.30).

Dr. Bourgeois stated that he had scheduled surgery for Claimant's left shoulder which was subsequently cancelled by Claimant on several occasions, for a variety of reasons, over the course of two years. Finally, Dr. Bourgeois discharged Claimant from his care on July 21, 1999 because of "his persistent delay of

[10]The record contains billing statements for this time period, but none of Dr. Bourgeois' medical notes. Therefore, beyond recording what Dr. Bourgeois billed for, there is no clear indication of Claimant's treatment.

treatment recommendations and failure to show up for scheduled surgery on the left shoulder on two occasions." As of July 21, 1999 Claimant was released to sedentary work, with an explanation of the future medical attention that would be necessary.

Dr. Bourgeois felt that Claimant's chronic costochondritis of the left inferior chest wall was a painful condition that would limit Claimant's ability to perform activity above a medium capacity. However, he further explained that once the requisite surgeries had been performed on Claimant's shoulder and hand, that Claimant could return to a medium capacity in an employment situation, which could include climbing ladders and carrying equipment weighing less than 40 lbs. Extrapolating from the pain and loss of strength, Dr. Bourgeois felt that Claimant's injury to the inferior chest wall would result in a 5% whole body impairment.

Finally, Dr. Bourgeois explained in the January 15, 2000 letter that when he had discharged Claimant, he had needed surgical subacromial decompression and resection of the acromioclavicular joint, which would resolve much of Claimant's shoulder pain. He further explained that Claimant's knee was at maximum medical improvement with a permanent impairment rating of 7% to the lower left extremity. Dr. Bourgeois expected that post-shoulder-surgery, Claimant could expect a permanent impairment rating of 10% to the upper left extremity. Dr. Bourgeois felt that Claimant's lower back condition was neither permanent, nor would result in any disability or impairment rating based on the lumbar strain. As to Claimant's thumb, he again deferred to the evaluation of a hand surgeon.

Dr. Scott Greenberg, an aesthetic and reconstructive plastic surgeon, evaluated Claimant on June 16, 1999. His report is Claimant's Exhibit 12. Dr. Greenberg stated that he wished to review Claimant's previous medical records, as well as have x-rays performed, and possible EMG/nerve conduction studies for carpal tunnel. Further correspondence suggests that Dr. Greenberg referred Claimant to Dr. Eric George who specializes in hand surgery. There are no records that indicate that Claimant ever saw Dr. George, however, he did see Dr. George's colleague Dr. Harold Stokes.

Dr. Harold Stokes is a hand specialist whose records are part of Claimant's Exhibit 11. On May 3, 1999 Claimant's attorney wrote Carrier a letter which stated that Claimant had chosen Stokes for on-going hand problem. Claimant saw Dr.

Stokes on August 10, 1999. In the patient history of Claimant, recorded by Dr. Stokes, it makes reference to Dr. Schiavi. Dr. Stokes wrote that Claimant explained that Dr. Schiavi had recommended surgery of the left thumb because he continued to have persistent pain.

After an examination, Dr. Stokes noted that there was no ligamentous laxity at the metacarpophalangeal joint. Claimant had excellent motion of the interphalangeal joint as well as the carpometacarpal joint. The x-rays showed no fractures. Dr. Stokes suspected that Claimant had some early arthrosis of the thumb, as well as clinical findings of induration and extensor lag. When Dr. Stokes manipulated the thumb, Claimant complained of pain, although he could find no accompanying crepitus. Dr. Stokes opined that Claimant might require an arthrodesis of the thumb, which would result in a 25% permanent impairment to the thumb.

Claimant returned to Dr. Bourgeois on May 22, 2001, at which time he was restricted from work and scheduled for surgery (CX 9, p.4). In June Claimant waited for the arthroscopy to be approved, and then on July 10, 2001, Dr. Bourgeois performed the subacromial decompression and Mumford procedure for the chronic impingement, subacromial bursitis and post-traumatic osteoarthritis in the left shoulder and acromioclavicular joint. Dr. Bourgeois continued to treat Claimant post-surgery, recommending Claimant return to his oral surgeon, as well as receive an MRI. He wrote prescriptions for medications as they became necessary.

On January 15, 2002, Dr. Bourgeois recorded that Claimant had been scheduled for thumb release surgery, while awaiting authorization for MRIs. The last document in Dr. Bourgeois records is dated February 15, 2002, and indicates that Claimant still needed MRIs for his left hip, right knee, and surgery on his left thumb, as well as light exercise for his left shoulder. He was never released to work throughout Dr. Bourgeois' treatment, from May 22, 2001 through February 15, 2002.

Dr. Thomas Lyons, an orthopedic surgeon, began treating Claimant on August 16, 1999. His records are Claimant's Exhibit 10. Dr. Lyons initially diagnosed Claimant as having left shoulder rotator cuff tendonitis and a symptomatic acromioclavicular joint, right knee patellar tendonitis, and a left hip sprain. He recommended physical therapy program, as well as non-steroidal

medication. Claimant saw Dr. Lyons again on September 29, 1999, at which time Dr. Lyons recorded that Claimant was unable to have his prescription filled and had not started physical therapy. Dr. Lyons gave Claimant sample medication with the anticipation that he would have a follow-up appointment in two to three months.

On October 26, 1999, Dr. Lyons noted that when Claimant returned he ordered a splint for his thumb and an MRI for evaluation of the left shoulder to rule out a rotator cuff tear. On November 4, 1999, Claimant returned and complained that his splint was too small and therefore he had been unable to use it, as well as commenting that he had been unable to start physical therapy, because it had yet to be authorized. Dr. Lyons re-prescribed a splint, and scheduled a follow up appointment.[11] By December 6, 1999, Claimant reported to Dr. Lyons that he had begun physical therapy. Dr. Lyons recommended continuing with the therapy as well as injecting the subacromial space with Marcaine and Celestone, and ordering another MRI.

Claimant attended physical therapy sessions at Crescent City Physical Therapy on January 7, 2000, and January 10, 2000, which had been prescribed by Dr. Lyons (CX 24). Claimant was diagnosed as having rotator cuff syndrome as well as chondromalacia.[12] Michelle Distefano, P.T., evaluated Claimant on both visits, and noted that initially Claimant had become belligerent with her, stating that "he could not move anymore", and she discussed the purpose of therapy, and commented that if Claimant was unwilling to move and participate then he was wasting time coming to therapy. Claimant agreed to participate, and reported feeling much better.

On the following visit, January 10, 2000, Claimant reported experiencing increased pain since the earlier session as well as admitting noncompliance with home exercise program. During the session, Claimant again became angered and raised his voice to Ms. Distefano, who explained that the pain was an indication of increased blood flow which would eventually decease. Claimant then agreed that

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[11]This is one of the medical expenses for which Claimant is requesting compensation.

[12]Claimant had undergone this particular therapy before at the recommendation of Dr. Walters, in May 1995, for treatment of his jaw problems. That visit is not contested, nor relevant for the contested issues, however, the sessions prescribed by Dr. Lyons are ones for which Claimant seeks reimbursement.

Ms. Distefano should inform Claimant's treating physician that he would not be returning.

On January 17, 2000, Dr. Lyons remarked that Claimant reported some improvement in his shoulder, and Dr. Lyons felt that it would be best to continue prescribing Celebrex as well as ordering a battery of tests, including: a MRI of the left shoulder and labral structures, and an EKG and nerve conduction studies of the upper right extremity to rule out carpal tunnel syndrome of the left hand. Dr. Lyons counseled Claimant on the need for surgical intervention of the left shoulder, due to the fact that he had failed to improve, despite prolonged conservative treatment.[13]

Claimant returned on February 7, 2000, and Dr. Lyons opined that the previously performed MRI evaluation showed evidence of a rotator cuff irritation as well as mild acromioclavicular joint arthropathy. Dr. Lyons noted, that after discussing all the various options with Claimant, he seemed anxious to have the surgery. Dr. Lyons indicated that the surgery, left shoulder arthroscopy with evaluation of labral structures, as well as rotator cuff repair, followed by a subcromial decompression and distal clavicle excision would be scheduled for the Claimant at his convenience. At the follow-up appointments on February 23, 2000 and April 4, 2000, Dr. Lyons refilled Claimant's prescription for Lorcet Plus #40 and awaited approval for the surgery.

On June 1, 2000, Dr. Lyons noted that Claimant's attorney had approved the surgery. He also recommended that Claimant see Dr. Richard L. Meyer, a hand surgeon, regarding his metacarpophalangeal joint. Dr. Meyer injected the tendon sheath at the AI pulley and referred Claimant back to Dr. Lyons for follow-up. Claimant's final noted visit with Dr. Lyons was July 5, 2000. After examining Claimant's knees, he recommended a strengthening program, noting no major problems. He remarked that Claimant continued to await approval for surgery.

Dr. Anthony Indovina, an oral and maxillofacial surgeon, first saw Claimant on March 4, 1996. In a letter dated March 8, 1996 (CX 13), Dr. Indovina assessed Claimant's clicking and popping in the temporomandibular joint ("TMJ"). After studying the x-rays, his impression was that Claimant suffered from bilateral

[13]This was the same surgery that Dr. Bourgeois had recommended and scheduled and Claimant had twice cancelled.

dislocated meniscus in both the right and left TMJ. Dr. Indovina also noted that Claimant suffered from a Class II malocclusion, with a tendency toward open bite and no anterior guidance, which can predispose a patient to TMJ-like symptoms. He recommended Claimant see Dr. Dennis Booth, an orthodontist, for splint therapy to try and alleviate the pain and dislocations of the TMJ. Dr. Indovina opined that if Claimant continued to have pain, after the splint had been prescribed, then he may become a candidate for arthroscopic surgery, either the right or left or both TMJ.

Dr. Dennis Booth, an orthodontist, first saw Claimant June 4, 1996, and his records are Claimant's Exhibit 23. Many of Dr. Booth's records are difficult to read; however, based on what is legible and an accompanying billing statement (CX 46), he continued to treat Claimant through June 9, 1998, during which time Dr. Booth referred Claimant to Dr. Demarcus Smith and his colleague Dr. P.J. Walters, both oral and maxillofacial surgeons. Dr. Booth treated Claimant with splint therapy beginning October 22, 1996, and reset the splint in July 1999. Dr. Booth again performed splint therapy in January 1998 and reset the splint twice, once on February 16, 1998 and then again on June 1, 1998.

Dr. Charles McCabe, a periodontist, saw Claimant on June 21, 1996, at the behest of Dr. Booth. His report is part of Claimant's Exhibit 13. After his examination, Dr. McCabe felt that Claimant had a occlusal trauma and recommended occlusal adjustment with re-evaluation followed by surgery where necessary. The surgery recommended by Dr. McCabe was accomplished in January and April of 1997.

There are documents in Claimant's Exhibit 25, that indicate that Claimant saw Dr. Demarcus Smith on September 25, 1997 at the Ochsner Clinic. During this visit, Dr. Smith recommended discontinuing the splint that had been put in Claimant's jaw. On October 16, 1997 Dr. Smith noted that Claimant was no longer wearing his splint, and recommended arthroplasty. Dr. Smith performed bilateral TMJ arthroplasty and repair on November 7, 1997.

Dr. Smith continued to see Claimant throughout November and December of 1997, treating his symptoms and prescribing pain medication. Dr. Smith's notations indicated that Claimant also continued to see Dr. Booth. On January 8, 1998, Dr. Smith re-prescribed the splint, and less than a week had passed when Dr. Smith noted that the splint was a good adjustment and that Claimant was to see Dr. Booth,

as well as have a follow up with Dr. Smith. On February 9, 1998, Dr. Smith explained to Claimant that because of his symptoms he was likely to need more surgery. Claimant remarked that if he had more surgery he did not want to wear the splint, but Dr. Smith explained that there were no assurances in that regard, due to his very poor occlusion. Dr. Smith recommended re-operation or a dermal graft.

In March 1998, Dr. Smith wrote that Claimant was better, but that arthroplasty could not be considered on the recommendation of Dr. Booth, Claimant's orthodontist. On April 16, 1998, Dr. Smith made a notation to call Dr. Booth, as well as mentioning that Claimant did not want a prescription for Ultram.

On May 26, 1998, Dr. Smith again recommended surgery, but also wanted to explore an orthodontist, while noting that Claimant wanted no narcotics.[14] Claimant had fewer appointments in June through August, and on August 14, 1998, Dr. Smith requested a new MRI be performed, with no other recommended treatment. Claimant did not return to Dr. Smith again until December 16, 1998. He recommended that if another surgery was considered he would like a second surgical opinion on the likelihood of the success of another operation, while noting that Dr. Booth had felt that Claimant was motivated by financial gain. Dr. Smith said that he could not determine if that was true, but felt it was possible. Finally, Claimant told Dr. Smith that his right jaw hurt more then before the surgery had been performed.

Dr. Demarcus Smith saw Claimant again on July 16, 1999 (CX 8). Claimant was complaining of right facial pain. Dr. Smith noted that since April, the symptoms had remained the same, there was a popping in the right temporomandibular joint (TMJ) when Claimant was reclined, but the left TMJ was symptomatic when Claimant was vertical. Dr. Smith explained further that surgery would likely be unsuccessful if other problems were not resolved, namely, the continued abnormal occlusion, heavy posterior wear, multiple missing teeth, and a malocclusion. Dr. Smith opined that Claimant could benefit from arthroscopy, provided he was active in orthodontic treatment. Once the orthodontics had been addressed, Dr. Smith commented that he would be happy to see Claimant again. In a letter dated September 24, 1999, Claimant's attorney wrote a letter to Carrier with

[14]This recommendation to see an orthodontist is an indication to me that Dr. Booth, Claimant's original orthodontist, was no longer treating Claimant.

the information that Dr. Smith has requested that Claimant see an orthodontist, and would they please approve payment as soon as possible (CX 43).

Dr. Raul Ramirez, a dentist, first saw Claimant on January 13, 2000, his records are Claimant's Exhibit 17. When Dr. Ramirez met with Claimant he commented upon the surgeries Claimant had undergone, including; 2 TMJ's, 1 knee surgery, gum surgery with Dr. McCabe, and then the splint surgery by Dr. Smith. The pain and the popping sound had returned with the splint. He recommended that Claimant have treatment to correct an occlusion, as well as root canal therapy, crowns, and bridges. Dr. Ramirez noted that this treatment might not completely correct him, but Claimant should feel better. Dr. Ramirez noted that Dr. Smith had instructed Claimant to see an orthodontist, and if the pain or problems persisted to return for oral surgery. Dr. Ramirez agreed, that if Claimant's condition did not improve, that he would be referred back to Dr. Smith for further surgery, but observed parenthetically that Claimant did not want any more surgery. Dr. Ramirez also explained that no orthodontia was necessary as it would only serve to open the bite even more. Dr. Ramirez went forward in attempting to correct the malocclusion with equilibration and an aqualizer.

In a note to Claimant's file dated January 19, 2000, Dr. Ramirez recorded that Claimant had talked to his attorney and "he said he can treat him." He considered an aqualizer or TMJ splint as well as equilibration and cleaning to maintain the periodontic surgery. Dr. Ramirez continued to treat Claimant, and as of January 26, 2000, it was noted that his ears were not popping and the headache in his forehead was gone. In the next entry in Claimant's file, Dr. Ramirez again noted that he must speak to Claimant's attorney prior to continuing treatment, ostensibly because Claimant wanted to change all his silver fillings to white. Also, Claimant said that his ear pain had completely disappeared, and consequently, Dr. Ramirez told Claimant that he would no longer prescribe pain medication. On February 7, 2000, Dr. Ramirez's file stated that he had spoken to Claimant's attorney concerning future treatment, which was put on hold until after the trial date of April 11, 2000.

Dr. Smith again saw Claimant on February 15, 2000, for an examination of continuing problems in the right perauricular region and TMJ (CX 8). Dr. Smith noted, in a letter to the claims adjuster Laura Sherman, that Dr. Raul Ramirez had done a partial equilibrium, and Claimant had better occlusion, however, there was

still poor coupling and guidance with the anterior teeth, which Dr. Smith described as unexpected and not able to be resolved without further orthodontic or prosthetic intervention. Dr. Smith opined that Claimant's pain was a combination of the malocclusion and disc displacement or deformation. In spite of Claimant's having gone through splint therapy and arthroscopy, Dr. Smith felt that the best course of treatment would be orthodontia with Dr. Ramirez, to improve the occlusion to where excursive functions have canine and protrusive guidance, making a splint unnecessary. In closing the letter to claims adjuster Laura Sherman, Dr. Smith mentioned that Claimant's treatment was going nowhere fast, and he requested a plan of therapy.

In a letter to Claimant's attorney dated May 17, 2002, Dr. Smith explained Claimant's evaluation of May 15th (CX 8). Dr. Smith noted that he had yet to requisition Claimant's surgical records from Ochsner Hospital, but he felt the situation was fairly consistent with the last time he saw Claimant. Claimant had ear pain, and popping when he opened his jaw, which could be eliminated with movement of the jaw to the right side, however, opening and closing and repeated chewing exacerbates the right-side ear pain. Left side had only posterior contact and there is a malocclusion which does not protect the joint. This malocclusion made muscle and joint pain likely, and also makes it unlikely that surgical intervention would be successful. Neither Dr. Smith, nor his colleague, would be willing to perform arthroscopic surgery until the malocclusion was addressed, which would require braces, and/or possible jaw surgery. In his opinion there was no other way to address the problem. Dr. Smith went on to explain that narcotics in this chronic situation would be inappropriate, with the exception of anti-inflammatories and muscle relaxants for flare-ups. Dr. Smith also recommended an Ear, Nose, & Throat (ENT) specialist for Claimant's complaints of ear pain, as well as a hearing test, before any TMJ treatment.

Dr. Ross, a audiologist at Ochsner Hospital, saw Claimant on December 14, 2000 his records are Claimant Exhibit 40. In a letter dated November 7, 2000 addressed to Claimant's attorney, Dr. Ross' office explained that the treatment had not been authorized by carrier, because Carrier claimed it was not related to the injuries sustained on April 27, 1995. Claimant's attorney had requested permission to see Dr. Ross on Oct, 16, 2000. Dr. Ross evaluated Claimant and determined that he had no hearing problems. Claimant now seeks reimbursement for this treatment.

Dr. Charles Murphy saw Claimant on May 30, 2002. The report at Claimant's Exhibit 41 simply recounts Claimant's medical history and notes his current medication, without making an independent findings.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in conformance with its purpose, and in a way that avoids harsh and incongruous results. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James*

v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on April 27, 1995 during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his shoulder, back, hand, knee and jaw when he fell from the ladder to the floor of the barge.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

There has been no claim from either party that Claimant had reached maximum medical improvement, and based on Dr. Bourgeois' and Dr. Smith's reports, Claimant is still awaiting the benefits of surgery and further treatment. Consequently, I find that Claimant has not reached maximum medical improvement, and so any compensation awarded after the date of the injury will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

As noted earlier in the stipulations, the parties agreed Claimant has been paid and is being paid benefits for temporary total disability from April 27, 1995 to January 18, 2000, and from July 10, 2001 to present and continuing. The only period for which compensation has not been paid, and which is in dispute, is from January 18, 2000 until July 10, 2001. In that regard, I find that Employer came forward with evidence of suitable alternative employment from January 18, 2000 until May 22, 2001, when Dr. Bourgeois removed Claimant from any work.

There is no contention that Claimant can return to his pre-accident job, and this placed upon the Employer the burden of establishing the availability of suitable alternative employment. In this instance, I find that Employer did establish suitable alternative employment as of December 22, 1999. Mr. Carlise's labor market survey did offer Claimant some job possibilities, and Employer is not required to act as an employment agency for the claimant. Instead, Employer identified jobs that were actually available within the local community that took into consideration Claimant's age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977).

Dr. Bourgeois, who had treated Claimant for four years preceding his July discharge from care, opined that Claimant was physically able to perform sedentary work, as early as July of 1999. The December 22, 1999, labor market survey, considering the limitations impose by Dr. Bourgeois, listed three realistic jobs for Claimant. Although, Claimant contends that he cannot work as either an airport checker or a towing dispatcher, and claims that the automated line worker is currently unavailable, I find that all three jobs were suitable.

Claimant was able to do limited walking, and since the airport checker position required no lifting, and, as Mr. Carlise explained, could be performed with a limited English proficiency, it was an appropriate job. Claimant has communicated effectively with his doctors, as well as with his attorney and testified meaningfully at the formal hearing. That is all an indication that he has enough English proficiency to manage directing passengers to the correct airport shuttle. As to the towing dispatcher, Mr. Carlise testified that based on hearing Claimant testify, he was still certain that Claimant would be able to perform the towing dispatcher's job. Even Ms. Lide agreed that Claimant has better English comprehension skills then is initially apparent. Therefore, there is no reason to assume that Claimant would be unable to perform that job.

As to the automated line job, Claimant could push buttons because he has intact gross motor skills. Dr. Meyer, a hand specialist, who examined Claimant in June 2000, stated that there were no fractures or degenerative diseases. Although Ms Lide stated that she could no longer locate the employer of automated line workers, Mr. Carlise testified credibly that the position was available at the time he did the market survey, and continued to be available when he later checked on employment opportunities in January of 2000.

In sum, I find that Employer has identified suitable alternative employment, and Claimant is owed no compensation January 18, 2000 through May 22, 2001, when Dr. Bourgeois once again restricted Claimant from any kind of work.[15]

[15]Since Claimant was receiving minimum compensation at that time, and all the above jobs pay minimum wage, there is no compensation due.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

Since Claimant had not been employed with Employer for substantially the whole year. 10(a) is an inappropriate method of calculating the average weekly wage Similarly, there is insufficient evidence to invoke the method designated under 10(b). Therefore, I will use 10(c) to most fairly and reasonably determine Claimant's average weekly wage at the time of his accident.

In this instance, Claimant urges that in calculating the average weekly wage, I consider the $11 hourly wage made by Claimant at the time of his injury, multiplied by the number of hours he would be expected to work, 40 hours per week, to arrive an idealized average weekly wage. Employer, on the other hand, argues that Claimant's tax returns, the information provided on his LS-203, which indicated he reported his earning as $12,000.00 (EX 7), combined with the opinions of two economists (EX 4&5), are an adequate indication that his annual earnings are between $11,000 and $12,000, and should be divided by 52 to arrive at an average weekly wage no greater than $233.25.

At trial, Claimant testified that he reported all his income on his tax returns, and suggested that the "missing" wages were during a time where he took leave to take care of his diabetic mother. However, Claimant has consistently earned less than the earning capacity he urges. In the 4 years preceding his injury, Claimant never earned more than $12,129.00, and both the Claimant's and defendant's experts in found that Claimant's yearly earnings at the time of his injury were approximately $12,000.00. As a result, I decline to calculate Claimant' average weekly wage based on the fiction that he would work a 40 hour week for 52 weeks of the year, when that had not in fact been the case in the four years preceding his accident. Therefore, I find that Claimant's annual wage earning capacity is

$12,000.00, which when divided by 52 weeks, the divider designated by 10(d), I arrive at the average weekly wage of $230.77, which would result in compensation payments of $153.84. However, since Claimant's average weekly compensation benefits would be less than half of the national average weekly wage determined by the Secretary of Labor, I find that Claimant shall receive the minimum, $190.23 as determined by §6 (b) of the Act, as compensation for his temporary total disability.[16]

Medicals

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's choice of physician. 33 U.S.C. § 907(c)(2). Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. *Id.*; 20 C.F.R. § 702.406. Consent to change physicians shall be given when the employee's initial free choice was not of a specialist whose services were necessary for, and appropriate to, proper care and treatment. However, when an authorized physician refers claimant to a new doctor, the new doctor must be considered to be the physician authorized to provide medical treatment, and no new authorization is required. *Maguire v. Todd Pac. Shipyards Corp.*, 25 BRBS 299, 301-302 (1992); *Swain*, 14 BRBS 657.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT)(D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused where the claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53 (CRT); *Swain*, 14 BRBS at 664; *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), *aff'd*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975). An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per

[16]The national average weekly wage (NAWW) for 1995 was $380.46. 50% of the NAWW would make the minimum compensation rate $190.23.

curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Betz v. Arthur Snowden Co.*, 14 BRBS 805, 809 (1981). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984); *Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956, 958 (1982).

Additionally, according to §7(d) of the Act, for a claim to be valid and enforceable against the employer, the employee's treating physician must furnish employer and the deputy commissioner, within 10 days following the first treatment, with a report of the injury or treatment in a form prescribed by the Secretary. *see also* 20 C.F.R. §702.134(a). Under § 7 (b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. *Roger's Terminal & Shipping Corp., v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.) *cert. denied* 479 U.S. 826 (1986).

The relevant facts in this case indicate that Claimant's injuries required a series of referrals. Both parties agree that Claimant's choice of treating physician was Dr. Warren Bourgeois, an orthopedist. Because Dr. Bourgeois felt that Claimant needed a hand specialist, he referred Claimant initially to Dr. Schiavi, then to Dr. Gallagher, and finally to Dr. Faust. The hand specialists, for whom Claimant claims reimbursement, are Drs. Greenberg and Stokes.

Claimant's mouth and jaw injuries also required several doctors. Initially, Claimant was seen by Dr. Anthony Indovina, an oral and maxillofacial surgeon, who felt that Claimant would be well served by Dr. Dennis Booth, an orthodontist. Dr. Booth treated Claimant as well as referring him to Dr. Charles McCabe for his periodontal surgery. Dr. Booth then referred Claimant to Dr. Demarcus Smith, who performed some of Claimant's surgeries as well as treating Claimant. Dr. Smith recommended that Claimant have a hearing evaluation, as well as recommending an orthodontist. Dr. Ramirez's treatment, a dentist, is one of the medical expenses for

which Claimant seeks reimbursement. Dr. Ross, a hearing specialist, is another medical expense for which Claimant is seeking reimbursement.

The principal medical expenses that are in dispute are Dr. Lyons treatment, as well as the prescriptions prescribed by Dr. Lyons, treatment provided by Dr. Ramirez and accompanying prescriptions, and outstanding bills for treatment provided by Drs. Ross, Schiavi, Smith, Bourgeois, Stokes, Billings, Booth, and Greenberg. Subject to the District Directors determination, as hereafter explained, I find that Employer is responsible for all outstanding bills of previously authorized physicians, Drs. Bourgeois, Booth, Smith, and Schiavi. Employer is also liable for the treatment rendered by Dr. Ramirez, Dr. Stokes, and Dr. Ross, based on the necessity and reasonableness of the expenses incurred. However, Employer is not liable for either the cost of prescriptions, for which Claimant had been issued a pharmacy account and had never requested and then been refused, nor Dr. Lyons treatment which was unauthorized, as Claimant had not been refused treatment by Employer. Claimant is only free to pursue necessary and reasonable medical treatment, without further authorization if Employer has refused treatment, or failed to satisfy the request for treatment. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988).

Claimant has requested reimbursement for medications prescribed during the period in which he was treated by Dr. Lyons. Claimant argues that the prescriptions were also "requested ongoing." However, other than the fact that they were prescribed by Dr. Lyons, and that Claimant requested *reimbursement* in two letters to Carrier[17], there is no evidence that Employer was aware that Claimant need the prescriptions. Ms. Fletcher testified, and there is no evidence to the contrary, that Claimant had been given a pharmacy card and account when his claim was first serviced by Employer. This was done to avoid Claimant having to pay cash for his needed medications. There is no indication from the record that Employer ever refused to authorize medications, or that the account had been closed. Rather than use the account, many of the pharmacy receipts list Claimant's attorney as the guarantor of the payment. Without evidence that the expenses sought to be reimbursed were in fact for *refused* services, I find Claimant is not permitted to be reimbursed.

[17]In the August 6, 2002, and April 19, 2002, Claimant's attorney claims reimbursement for past prescriptions.

As to reimbursement for Dr. Lyons' treatment, Claimant argues that when Dr. Bourgeois discharged Claimant from his care in July 1999, it was a refusal of treatment and he was therefore allowed to select another treating orthopedist. He requested authorization of Dr. Lyons and it was refused. Claimant claims that the treatment was necessary and reasonable, and therefore Employer is liable. Employer does not deny that Dr. Lyons was not authorized, however, the reason for the denial was that Claimant had already chosen his own orthopedist, Dr. Bourgeois, and there was no refusal of treatment, and the authorization of Dr. Lyons was unnecessary and redundant. I agree with Employer.

Dr. Bourgeois was *Claimant's* choice of treating physician, not Employer's. Therefore, Dr. Bourgeois' decision to discharge Claimant due to his non-compliant behavior is not a direct reflection on Employer. Employer had authorized treatment by Dr. Bourgeois and all those doctors to whom Dr. Bourgeois had referred Claimant. There was no lack of authorized specialists or treatment, until Claimant chose to miss appointments and cancel scheduled surgeries. Dr. Bourgeois made it clear in the letter dated January 2000, that Claimant's treatment was by no means complete, and he went through the effort to detail the necessary procedures and treatments that he felt Claimant still needed.

This is not the case of a mis-diagnosis or mistreatment or true discharge, in which event a claimant would need to seek another physician. As a matter of fact, Claimant eventually returned to Dr. Bourgeois when he decided to go through with the shoulder surgery that he had repeatedly cancelled during his treatment. Since there is no evidence that Dr. Bourgeois' discharge of Claimant for non-compliant behavior was a refusal by *Employer* of necessary medical treatment, there was no reason for Claimant to seek authorization for another orthopedist. He merely had to appear for scheduled appointments and surgeries, to continue to be treated for his medical needs. He was never refused treatment by Employer or Carrier, and Dr. Bourgeois did not decline to treat Claimant once he adhered to Dr. Bourgeois' instructions. Therefore, Employer's failure to authorize Dr. Lyons, when Dr. Bourgeois was already authorized and providing treatment, is not tantamount to a refusal.

The Board held in *Slattery Associates v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984) that the physicians positive diagnosis and release to work did not amount to a refusal of treatment. An employer is not considered to have

refused to provide treatment merely because its physician proposes a different method of treatment from a claimant's physician, unless the treatment is demonstrably improper and medically unacceptable. In this case, although the facts are marginally different, the same reasoning applies. Dr. Bourgeois did not refuse treatment when he released Claimant to sedentary work with an accompanying explanation of further necessary medical treatment. His actions were neither medically unacceptable nor demonstrably improper.

Furthermore, the treatment provided by Dr. Lyons was in no way different from that which Dr. Bourgeois had provided or recommended. Therefore, Dr. Lyons' treatment of Claimant was unnecessarily repetitious, and for that additional reason, not covered by §7 of the Act. Employer did not refuse Claimant his own choice of orthopedic physician. Therefore, Dr. Lyons' treatment is not a covered medical expense under §7 of the Act.[18]

Claimant has also requested reimbursement for expenses related to Crescent City Physical Therapy and Orthopedic Specialists(CX 42). There is no record that Claimant had requested that these particular services be authorized by Employer/Carrier either. Therefore the services rendered are not the liability of Employer.

As to Dr. Ramirez, Claimant maintains that it was a necessary referral from Dr. Smith. Dr. Ramirez noted from his first evaluation that no orthodontia was necessary, because it would only serve to open the bite more.[19] However, he did recommend root canal therapy, crowns, and bridges, as well as treatment to correct the occlusion.

Although Dr. Smith mentioned the work that Dr. Ramirez was facilitating, there is no indication that he was referred by Dr. Smith. Therefore, since Dr. Ramirez was not authorized by way of a direct referral, and his request for treatment

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[18] It is worth noting that there is a procedure available for claimants who wish to *change* their choice of physician. Once Claimant has made his initial, free choice of a physician, he could have changed physicians by obtaining prior written approval of the employer, carrier, or deputy commissioner. *see* 33 U.S.C. §907(c)(2); C.F.R. §702.406. Claimant never availed himself of that option, but merely went ahead and paid for the treatment by the unauthorized physicians.

[19]Claimant's attorney listed Dr. Ramirez's services as an "orthodontist" in his letter dated August 6, 2001.

had been requested and denied[20], it is necessary to determine whether the treatment was necessary and reasonable for Claimant's medical improvement.

In February 2000, Dr. Smith noted that Dr. Ramirez had performed a partial equilibration, and the Claimant had much better occlusion. He opined that if Dr. Ramirez could improve the occlusion to where excursive functions have canine and protrusive guidance, then a splint would not be necessary. However, he also noted that Claimant's treatment was going nowhere fast, and he wanted to see a plan of therapy formulated. On the basis of Dr. Smith's discussion of Dr. Ramirez's treatment, it appears that the treatment was reasonable and necessary for improving Claimant's occlusal difficulties, in spite of the fact that it was not authorized. Therefore, Dr. Ramirez's treatment was an important complement to Dr. Smith's treatment, and medically necessary and reasonable is covered by §7 of the Act.

Dr. Ross, an ear nose and throat doctor, saw Claimant to determine the possible sources of Claimant's complaints of ear pain. Claimant's attorney had requested treatment by Dr. Ross on October 16, 2000, as well as requesting an ENT physician in a letter dated December 1, 1999 to Carrier. It was never approved. Dr. Smith later recommended an ENT as a medically necessary test, in his May 2002 letter to Claimant's attorney (CX 8). Claimant's complaints of ear pain, which had been attributed to his jaw injury, might have been a result of an ear problem. It was important for further treatment to have the source of Claimant's pain isolated. However, it was not approved at the time it was requested, and as such, I must make a determination of the reasonableness and necessity of Claimant's treatment.

I find that since it was a test that was eventually recommended by Claimant's oral surgeon, and did serve to rule out the alterative sources of the TMJ symptoms. There is no evidence from the medical records available that Claimant had seen an ENT before Dr. Ross, and the testing was subsequently recommended by Dr. Smith. Claimant was found to have no hearing problems, an indication that the pain was attributable to the TMJ. It was therefore a medically necessary evaluation.

Dr. Greenberg, an aesthetic and reconstructive plastic surgeon, initially saw Claimant and referred him to Dr. Stokes, a hand specialist, who evaluated Claimant on August 10, 1999. However, Dr. Greenberg was not requested by Claimant, and

[20]Attorney's letters to Carrier dated September 24, 1999, January 4, 2000, and August 6, 2001.

therefore not refused by Employer/Carrier, and so his treatment is not covered. Dr. Bourgeois had deferred all determinations concerning Claimant's hand injuries to a hand specialist, and as such Claimant had seen Dr. Schiavi, Dr. Faust, and Dr. Gallagher. Claimant continued to have difficulties with his hand, and even in discharging Claimant from his care, Dr. Bourgeois deferred to a hand surgeon for recommendation, prognosis and disability of the left hand. Treatment by Dr. Stokes was requested in Claimant's attorney's letter dated February 25, 1999. The treatment was not approved. However, Dr. Stokes evaluation was thorough and helped to provide a diagnosis and plan of treatment for Claimant's hand that was current. There was no evidence in the record of the extent of Dr. Schiavi's treatment, and therefore, in the absence of any evidence that Claimant was being treated for the hand injuries, and in light of Dr. Bourgeois continued recommendations and referrals to a hand specialist, I find that Dr. Stokes treatment was necessary.

Despite any finding of responsibility on the part of Employer, however, Employer argues that neither Dr. Stokes, Ross, nor Ramirez, submitted medical reports to Employer or Carrier, in violation of Section 7 of the Act concerning choice of physician and the claimant's obligation to provide medical reports to the defendant.

The Act provides for a 10 day compliance with the medical report requirement; however, section 702.422(b) of the Code of Federal Regulations states "for good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act..." C.F.R. §702.422(b)(1985). The pre-1985 regulations allowed both an administrative law judge (ALJ) and the District Director to make this decision. *see Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992); however, the Benefits Review Board has taken notice that the revised (1985) regulations only grant the District Director discretion in this area, and the Board has held that an ALJ cannot decide whether or not to excuse a doctor's failure to send a report of treatment to an employer within 10 days of providing the medical care. *Toyer, et al. v. Bethlehem Steel Corp.*, 28 BRBS 347, 351-355 (1994); *Krohn v. Ingalls Shipbuilding, Inc. et al.*, 29 BRBS 72, 75 (1994); *Jackson v. Universal Maritime Service Corp.*, et al., 31 BRBS 103(1997).

Employer has claimed that it received no reports from any of the doctors, and there is no significant evidence to controvert that claim. Therefore, in the absence

of evidence that any of Claimant's physicians provided the reports within the time periods specified by the Act, I am unable to excuse, or not excuse, Claimant's physicians' failure. So even though I have determined that Employer is otherwise liable for Drs. Stokes, Ramirez, and Ross, I cannot proceed to order liability upon Employer at this time. Consequently, as per the Board's instruction, and as convoluted as it might appear, I must now remand the issue of §7(d)(2) to the District Director, who may, for good cause and in the interest of justice, waive the requirement as to the medical providers.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on May 5, 1995 (EX 10). Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from April 27, 1995 and continuing at the rate of $190.23 provided, however, that Employer/Carrier is relieved of paying Claimant compensation for the period from January 18, 2000 until May 22, 2001, during which time Employer has established the availability of suitable alternative employment;

(2)Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(3)Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(4)Employer/Carrier is liable, as heretofore determined, to pay or reimburse Claimant for all necessary and reasonable medical expenses resulting from Claimant's injuries of April 27, 1998, however, the issue of medical expense debt as to Drs. Stokes, Ross, and Ramirez, is remanded to the District Director to determine whether the untimely filing of the doctors' initial medical reports may be excused in the interests of justice;

(5)Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(6)All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 16th day of December, 2002, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam